IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 37

ALLEN I. NILVA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order and opinion dated February 25, 1957, affirming his conviction for criminal contempt on specification No. 3, vacating the sentence and remanding the case to the District Court for reconsideration of the sentence.

of Appeals for the Eighth Circuit at St. Paul, Minnesota, on a different appeal (R. 9). Petitioner testified that he and a clerk had examined thousands of invoices for the months from January through April 1951, but were unable to find any for used machines (R. 17–20).

After the court was convinced that all the required documents (other than the exhibits in the Court of Appeals) had not been produced by petitioner, it ordered the United States Marshal to impound all the Mayflower records (R. 23). On April 2, 1954, F. B. I. agents started an examination of the impounded records (R. 70). Records impounded at Mayflower's place of business which dealt with purchases in late 1950 and 1951 were introduced in evidence at the Christianson retrial (R. 35,, and on the basis thereof an F. B. I. agent testified to sales which were not reflected in the records produced by petitioner (R. 68–90).

On April 15, 1954 petitioner again appeared before the court in response to a new subpoena directed to him personally, and stated that the subpoena was unnecessary as he would have come voluntarily (S. R. 39). The court then ordered petitioner not to leave the jurisdiction of the court. Petitioner said, "I will be pleased to comply with the order of the Court" (S. R. 39). When government counsel asked petitioner to produce again the records which petitioner had previously produced under subpoenas Nos. 78 and 160 and which had been turned back to the secretary of Mayflower (*supra*, p. 5), petitioner stated that he did not know where the records were. The court then or-

dered him to produce them by 2:00 p. m. of the same day (S. R. 43). At the time, Paster's counsel stated that the attorney who was representing petitioner in this matter would like to examine the record if any proceedings were instituted against petitioner. Petitioner remarked that he was "not going to raise any technical objections" but wanted only "to cooperate with the Court" (S. R. 43). The court, after stating again that it ordered petitioner to remain in the jurisdiction and not leave without permission, cautioned everyone present at the hearing not to report the proceedings to anyone lest the jurors in the Christianson retrial learn of them and possibly be influenced (S. R. 44).

On April 22, 1954, the jury in the Christianson retrial found the defendants guilty (S. R. 20). On April 23, 1954, the court issued an order (R. 2–5) pursuant to Rule 42 (b), F. R. Crim. P. (*supra*, pp. 3–4), directing petitioner to appear on April 27, 1954, and show cause why he should not be held in criminal contempt for obstructing the administration of justice by (1) false and evasive testimony on April 1, 1954, upon answering the two subpoenas duces tecum directed to Mayflower (Nos. 78 and 160); (2) disobedience to subpoena No. 78 in not producing 5 specific items; (3) disobedience to subpoena No. 160 and to the court's order of March 29, 1954, in not producing 22 specific items. On the morning of April 27, 1954, petitioner's counsel requested a bill of particulars and an extension of time (R. 28–33). The motion for a bill of particulars was denied, but the hearing was continued until 3:00 p. m. of that day (R. 35–36).

The court expressly ordered that petitioner's counsel should have access to all of the impounded records (R. 35).

The hearing on the show cause order resumed at 3:00 p. m. on April 27. Petitioner's sole objection to proceeding at this time was that the court had denied his motion for a continuance to some further time and for a bill of particulars with respect to the first specification (R. 35, 36). At petitioner's request, the transcript of his testimony of April 1, 1954, a copy of which he had admitted receiving on April 16, 1954, was made part of the record, as were subpoenas Nos. 78 and 160 (R. 38). Petitioner testified in his own behalf (R. 38–66), and admitted seeing subpoena No. 160 shortly after it was served on the secretary of the Mayflower Distributing Company (R. 41, 63). Petitioner testified to having searched for records with a Clarence Wesley, a clerk in the office of the Mayflower Distributing Company (R. 43, 45), but Wesley was not called as a witness.

The books and records which had been impounded by the marshal, and which petitioner was charged in Specification No. 3 with having failed to produce under subpoena No. 160 (*supra*, p. 7), were before the court (R. 42–43), and petitioner admitted that he had not brought them pursuant to the subpoena (R. 42–43, 46–54). The first four of the 22 items set forth in Specification No. 3 were introduced in evidence at the hearing (R. 45–48, 59). These were the 1950 and 1951 general ledgers of various Paster enterprises, including the Mayflower Distributing Company, and the Mayflower journal covering the

1950–51 period. Petitioner admitted having previously examined the ledgers but claimed that he was unable to find any evidence of slot machines therein (R. 47). He testified that he did not know whether the 1950 ledger contained any records pertaining to new and used slot machines during the period July 1, 1950-April 30, 1951 (R. 46). In actual fact, this ledger reflected sales of new slot machines in the sum of $13,281.00 during the period October 1950-January 1951 and sales of used slot machines in the sum of $70,128.00 during the period July 1950-January 1951. Purchases of used slot machines, reflected in this same ledger, amounted to $25,605 during the period August 1950-January 1951 (S. R. 51–52).[2]

When questioned about the remaining items enumerated in Specification No. 3, petitioner admitted that he had not examined more than half of them, his excuses ranging from "I couldn't find that" to "I don't think there were any" (R. 46–54). For example, although subpoena No. 160 (R. 24–25) specifically called for the production of "letters", petitioner testified that he did not check any correspondence files (R. 53). At one point, he stated (R. 53):

> * * * I didn't check any correspondence files. I did check the purchase files.

However, immediately thereafter when his attention was directed to the fact that failure to produce a

[2] Petitioner moved in the court below to strike certain portions of the Supplemental Record (S. R. 69–72), but no objection was made to S. R. 51–58, the list and description of exhibits.

purchase file was an item of Specification 3, petitioner claimed (R. 54):

> I didn't make any examination of the purchase file. I don't think we have any purchase file as such. I certainly couldn't find any.
>
> Q. [Petitioner's counsel] In any event, you didn't examine it?
>
> A. I didn't examine it. I couldn't find any.

After petitioner introduced in evidence those records which he had produced (R. 59), the transcript of the testimony of F. B. I. agent Peterson in the Christianson retrial (R. 68–100) was, upon the government's motion, admitted in evidence, over petitioner's objection that it was hearsay and that he was deprived of the opportunity of cross examining Peterson (R. 59–61). This colloquy took place (R. 60–61):

> Mr. DIBBLE [Government attorney]. I think that it [the transcript of Peterson's testimony] was part of the record of this Court and it was made in the presence of the Court. It constitutes part of the record to establish the importance of the records that Mr. Nilva [petitioner] did not bring in.
>
> The COURT. Well, that seems proper to the Court. In fact, it seems to me that in this proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt proceeding arose out of the respondent's [petitioner's] actions in the case of *United States* v. *Christianson, et al.*

* * * * *

> I think the record in this proceeding ought to disclose the fact that this respondent [petitioner] was an attorney of record for the defendant Paster in the case we have just completed trying.
>
> The objection is overruled.

Petitioner then stated that, although he had been an attorney of record for Paster, he did not sit at the counsel table and took no part in the proceedings (R. 61–62).

At the conclusion of the hearing, the court found petitioner guilty of all three specifications in the contempt citation, and imposed a sentence of imprisonment for one year and one day (R. 67). On appeal, the Court of Appeals unanimously affirmed (S. R. 82).

SUMMARY OF ARGUMENT

Since petitioner's conviction for contempt can be sustained on the basis of Specification No. 3 which charged him with having willfully disobeyed subpoena No. 160 and the order of the court for the production of these Mayflower records, it is not necessary to consider his conviction on Specifications No. 1 and No. 2, which are of doubtful validity. His conviction on Specification No. 3 was supported by a sufficiency of proof and obtained with no defects in procedure.

I

A. Petitioner was properly adjudged guilty of contempt for failure to produce existing books and records of the Mayflower Company in response to subpoena No. 160. A prima facie case of contempt was established by showing both that the records called

for by the subpoena were not in fact produced and that such books and records, which were present in the court room during the contempt proceeding and four of which were formally introduced in evidence, were in existence when the subpoena was issued and served.

It was incumbent on petitioner, in the light of the prima facie case of contempt, to exonerate his noncompliance with the subpoena duces tecum by proving a legally sufficient excuse. Petitioner did not sustain his burden merely by stating that he could not find evidence of certain transactions in records he admittedly examined which clearly reflected those transactions, that he could not find the records, that he did not think there were such records, and that he produced such records as he was able to find.

B. The procedure by which petitioner was adjudged in contempt on Specification No. 3 accorded him due process of law. Such errors as may have arisen did not adversely affect his substantial rights or prejudice his cause on this charge of contempt. The transcript of testimony of an F. B. I. agent during the Christianson retrial, to which petitioner objects, was not relevant to Specification No. 3. It added little to the proof of the only essential facts, *viz*, that the subpoenaed documents existed and that petitioner failed to produce them.

Petitioner was allowed sufficient time to prepare his reply to the order to show cause why he should not be adjudged in contempt for noncompliance with subpoena No. 160. The record reveals that he had ample time to comply with the subpoena or, in the alterna-

tive, to establish his legal excuse for noncompliance. Since on the return day of the subpoena, petitioner, rather than urging his excuse for not producing the documents, took the position that he had complied with its direction, he cannot now well claim he was not accorded sufficient time to establish an excuse. Furthermore, on April 15, 1954, petitioner was put on notice that he would be held to answer to contempt charges when the Christianson retrial ended. As the contempt case was not called for hearing until April 27, 1954, he had ample time to prepare his defense.

II

Petitioner is not entitled to a new trial on his conviction for contempt under Specification No. 3. Since the general sentence of one year and one day imposed on petitioner is within the limits of the penalty that may be imposed on each specification, it can be sustained if the conviction on Specification No. 3 is valid. The punishment imposed seems to have been for the one general act of disobedience to the subpoena, rather than for the multiplicity of specifications. However, since the government does not seek to sustain the convictions on Specifications No. 1 and No. 2, the Court may wish to remand the cause for reconsideration of the sentence in the light of the conviction on one specification alone. In that event, however, there is no necessity for a retrial on the third specification.

ARGUMENT

Petitioner's conviction for contempt may be sustained on the basis of Specification No. 3, which

charged him with having wilfully disobeyed subpoena No. 160 and the order of the court for the production of the Mayflower records.[3] On this specification, as we develop more fully below in Point I, there was a

[3] As set forth in the government's brief in opposition to certiorari, pp. 14–17, we have very grave doubts as to the validity of the conviction on the other two specifications.

Specification No. 2 relates to non-compliance with the subpoena covering invoices of sales to two individuals. At the Christianson retrial, the Mayflower bookkeeper had testified that, prior to the first trial, he had removed invoices as to these individuals and replaced them with slips of paper pursuant to instructions from petitioner (S. R. 37). The slips were found among the records impounded by the marshal (S. R. 63, 68). This testimony, which was not part of the contempt record, but which was referred to by the Court of Appeals, tended to negative the existence of the records at the time the subpoena was served. Under these circumstances, we do not support the conviction for disobedience of that subpoena. *Patterson* v. *United States*, 219 F. 2d 659 (C. A. 2). The government's own evidence rendered inapplicable the normal rule that a corporation will be presumed to have in its possession the type of records which it would ordinarily keep, and that it is the burden of the person subpoenaed to explain their non-production.

As to Specification No. 1, to the effect that petitioner gave false and evasive testimony on April 1, 1954, when he purported to comply with the subpoenas, there is a serious question as to whether the false testimony was so clearly obstructive of justice, beyond that involved in perjury alone, as to differentiate this case from *In re Michael*, 326 U. S. 224, and to render the false testimony, independent of non-compliance with the subpoena, a proper basis for contempt. We have not undertaken to resolve that issue for the reason that we also have serious doubts as to the procedure in relation to that specification. It seems that although, as discussed in the text (*infra*, pp. 15–21), the presence of the missing books in evidence and in court makes out a prima facie case of non-compliance with the subpoena, without the F. B. I. agent's testimony, the fact of the existence of the books without other explanation may not be enough to show that petitioner's testimony was false and evasive. Since the F. B. I. agent's testimoney was introduced without his presence, there was a tech-

sufficiency of proof and no defect in procedure. There then remains only the question whether, on the one specification alone, the sentence may be sustained. As we discuss in Point II, we think that the sentence was for the one general act of deliberate disobedience to the subpoena and that there is no occasion to remand the cause for reconsideration of sentencing, but, in any event, a remand for reconsideration of the sentence would be the maximum relief to which petitioner would be entitled.

I

PETITIONER WAS PROPERLY ADJUDGED GUILTY OF CONTEMPT FOR FAILURE TO PRODUCE BOOKS OF THE CORPORATION WHICH WERE CALLED FOR BY THE SUBPOENA

A. *A prima facie case of contempt was established by proof of non-production, plus proof that the records called for were in existence*

The law of criminal contempt is clear that no individual may refuse to surrender existing documents of a corporation or association if they be within his

nical violation of the rule of confrontation. This was not cured by the fact that petitioner was an attorney at the Christianson retrial since he would not there have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated.

We cannot agree with the court below that the contempt was punishable as a summary one under Rule 42 (a) for it seems to us that, while petitioner's testimony on its face was unconvincing, the real proof of evasiveness stems from the subsequent evidence that the books were in existence and could, with genuine effort at compliance, have been found. Under these circumstances, the whole contempt on this charge was not committed in the presence of the court. See *Nye* v. *United States*, 313 U. S. 33; *In re Oliver*, 333 U. S. 257; *In re Murchison*, 349 U. S. 133.

control. *United States* v. *Fleischman,* 339 U. S. 349; *United States* v. *White,* 322 U. S. 694; *Wilson* v. *United States,* 221 U. S. 361; *United States* v. *Field,* 193 F. 2d 92 (C. A. 2), certiorari denied, 342 U. S. 894. A criminal contempt is committed when the witness fails to produce the corporate records called for by the subpoena at the time and place appointed. *Brown* v. *United States,* 276 U. S. 134; *United States* v. *Bryan,* 339 U. S. 323. As this Court stated in *United States* v. *Fleischman, supra,* at 365, "A subpoena is a sterile document if its orders may be flouted with impunity."

A prima facie case of criminal contempt, grounded on the failure of the defendant to produce documents in compliance with a valid subponea, is made when the government shows that a valid subpoena duces tecum was served on the defendant requiring him to produce existing books and records within his control, and that he failed to do so.[4] This Court said in *United States* v. *Bryan,* 339 U. S. 323, 330:

> * * * But when the Government introduced evidence in this case that respondent had been

[4] Petitioner's attack upon the validity of subpoena No. 160 (Br. 56–58) is unfounded. Even a cursory reading of the subpoena reveals that it is neither unreasonable nor oppressive within the intendment of Rule 17 (c), F. R. Crim. P. It was directed to the Mayflower Distributing Company and required them to produce only specific books and records which are usually maintained in the normal course of business by a commercial enterprise. It was narrowly limited to those books and records kept during the 10-month period between July 1, 1950 and April 30, 1951, which reflected transactions in "slot machines, flat-top or console, coin operated device, whether new or used." Cf. *Wilson* v. *United States,* 221 U. S. 361, 376.

> validly served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it made out a *prima facie* case of wilful default.

See also *Patterson* v. *United States*, 219 F. 2d 659, 660 (C. A. 2); *Lopiparo* v. *United States*, 216 F. 2d 87, 91–92 (C. A. 8), certiorari denied, 348 U. S. 916.

In the contempt proceedings against petitioner, the facts (which are largely undisputed) necessary to make out such a prime facie case were established. It was shown that subpoena No. 160 (the one involved in Specification 3) was served on the Mayflower Company (R. 24–25); that petitioner responded on behalf of the company (as its vice president) as the person who was complying with the subpoena (R. 8–9); and that he had not brought all the records called for in the subpoena. This last fact was not only admitted by petitioner at the contempt hearing (R. 42–43, 46–54), but had been previously established by petitioner's testimony on April 1, that he could not find the records (R. 15–16; *supra*, p. 6). The existence of the records, enumerated in Specification No. 3, was shown by the fact that they were present in the court room when the contempt hearing commenced (R. 42, 58–59), and that four were formally introduced in evidence (R. 59).

Thus, a complete case was established without any reliance upon the F. B. I. agent's testimony at the Christianson retrial. Any error in the manner by which such testimony was admitted (see *supra*, p. 14, fn. 3) is therefore immaterial in relation to this

specification. While the court was in error in relation to the other two specifications when it spoke of the burden being on petitioner (R. 29), it was not in any practical sense in error in relation to this specification for the basic facts of the government's prima facie case were not realistically in issue. They were not disputed.

When a prima facie case of contempt based on noncompliance with a subpoena duces tecum has been established, it becomes incumbent on the defendant, if he would exonerate himself from guilt, to prove a legally sufficient excuse for his failure to produce the records. *Lopiparo* v. *United States,* 216 F. 2d 87, 92 (C. A. 8), certiorari denied, 348 U. S. 916, and the other cases cited *supra,* pp. 16–17. It works no injustice on a defendant to cast on him the burden of proving the negative averment that he could not find the documents called for by the subpoena.[5] *Rossi* v. *United States,* 289 U. S. 89, 91–92; *United States* v. *Fleischman,* 339 U. S. 349, 360–361. It was this burden of excusing non-production that the court referred to in *London Guarantee & Accident Co., Ltd.* v. *Doyle & Doak,* 134 Fed. 125, 128 (C. C. E. D. Penn.), when it wrote:

> It cannot be doubted, I think, that the burden of proof was upon them. The court's order

[5] For other instances in which the burden of proving facts peculiarly within his own knowledge is cast upon the defendant, see IX Wigmore, *Evidence,* 3rd Edition 1940, § 2486; cases collected in 56 A. L. R. 1273, 1274 (in bigamy prosecution, burden of proof of dissolution of first marriage rests with accused); 153 A. L. R. 1218, 1251 (defendant must prove he comes within exception to criminal statute where based on matters personal to him).

> of June 25th necessarily implied that the books and papers were in existence, and within the defendants' reach. If they knew then that the facts were otherwise, it was their duty so to inform the court at once, and to object to the making of an order with which they must have known that they would not be able to comply. Failure thus to act at the proper time is properly followed by imposing upon them the burden of excusing their apparent disobedience to the order; and the same result follows, even if they were ignorant concerning the existence and whereabouts of the books, but did not take the trouble to ascertain in advance whether or not they could comply with such an order, and contented themselves with resisting the application upon other grounds. When a court requires the production of documents, it is presumed that these can be had; and, while the presumption is not conclusive, it has force enough to compel the party upon whom the order is made to undertake the task of showing to the court's satisfaction why the order cannot be fully complied with. If he leaves the matter in doubt or uncertainty, the presumption is not overcome, and the usual consequences of failure must be borne by the party who has failed to sustain the burden of proof.

A review of the record in this case makes it manifest that petitioner did not sustain his burden of proving his excuse for not producing the records. He could not absolve himself from the contempt charge merely by stating under oath that he had previously examined some of the records and could not find any evidence in them that was called for by the subpoenas,

or that he did not think there were such records, and that he produced whatever he was able to find (R. 48–50, 52–54, 58). As the court noted in *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916:

> The District Court did not believe and was not compelled to believe the testimony of the appellant that he was unable to find the books he was ordered to produce. The court was the judge of the appellant's credibility and the weight of his evidence. The appellant's self-interest was obvious. His defense was one easily fabricated and almost impossible to disprove.

The fact that petitioner did not make a good faith search for the required records—regardless of his protestations of having done all he possibly could to comply with the subpoenas—is apparent from the fact, as observed by the court below (S. R. 80), that "practically all of the records called for by the subpoenas were later found when the records were impounded and examined." Certainly, in the face of the fact that common books such as the 1950 and 1951 general ledgers and journal of the company were actually before the court and in evidence (R. 42–47, 59) and that the subpoena had called for these very books (R. 24–25), the court was justified in finding that petitioner's attempted explanation was less than "an adequate excuse" under Rule 17, F. R. Crim. P. for the admitted non-production. The "* * * prosecution need not negative every self-exculpatory suggestion of a recalcitrant witness * * *" *United States* v. *Patterson*, 219 F. 2d 659, 662 (C. A. 2).

Petitioner also urges that the third specification was not proven because the subpoena was not directed to him but to the Mayflower Distributing Company, and was served on the secretary-treasurer of that company; that petitioner was not the custodian of the records of that company; and that Paster and not petitioner had exclusive control over the corporate records (Br. 48). But petitioner voluntarily appeared in answer to the subpoena and purported to comply with it (R. 8–9, S. R. 43), thereby waiving any objections on the grounds that the subpoena was not addressed to him. See *United States* v. *Bryan*, 339 U. S. 323, 333. Further, it was apparent that petitioner had access to the corporate records for he claimed to have searched through them (R. 16–18, 42). Indeed, he admitted that he had previously examined the very two records which are items (a) and (b) of Specification 3 (R. 47). The Government need not show that petitioner was the "authorized custodian" of the records but merely that "he had the demanded documents in his possession". *United States* v. *White*, 322 U. S. 694.

B. *The procedure by which petitioner was adjudged in contempt on Specification No. 3 fully accords with due process*

1. There were no errors in procedure which affect the conviction on Specification No. 3. Petitioner relies chiefly on the alleged violation of his right to confrontation in the introduction of the testimony of the F. B. I. agent on the Christianson retrial without calling the agent himself as a witness.* As we have

* While, as we have hitherto stated, we think that, if the testimony were of any significance, there was a violation of the

REASONS FOR GRANTING REHEARING

I. The majority of this Court has rested its affirmance of the conviction on the merest shred of evidence, evidence which was introduced as the consequence of an erroneous burden placed upon petitioner by the trial court. Confronted with an unprecedented record in which the prosecution had wholly failed to introduce even a shadow of a shred of competent evidence, this Court was forced to search for a basis for the conviction in the evidence introduced by petitioner. The majority believed that it found such evidence in petitioner's rather cryptic statement that he had "previously examined" two items which he introduced into the record. Without conceding that the inference drawn by the majority is supported by the evidence relied upon, it is earnestly submitted that this Court was in grievous error in assuming that petitioner's statement and the records introduced by him could properly be considered in weighing the sufficiency of the evidence below.

The Court wholly failed to note that petitioner's testimony and the documentary evidence were introduced only because the trial court erroneously placed upon him the burden to proceed (R. 29), notwithstanding the objections immediately raised by petitioner's counsel (R. 29). There can be no question of the trial court's error in forcing petitioner to proceed in flagrant disregard of the traditional rules as to burden of proof and the presumption of innocence in criminal contempt proceedings. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 444; *Michaelson* v. *United States*, 266 U.S. 42, 66. And if it be granted that the order to proceed was erroneously given, then

it must follow that the fruits of that order are tainted with the same error.*

This Court will permit no man to stand convicted in a federal court on the basis of a coerced confession or on a record which contains evidence obtained through an unlawful search or seizure. Certainly the rule should be no less stringent where the evidence has been improperly adduced not by the prosecution but by the court itself. It is manifest that the evidence relied upon by the majority of this Court was not properly obtained. It was the direct and intended result of an erroneous ruling by the trial court, a ruling which stripped petitioner of the presumption of innocence and which forced him to assume the burden of proof. There was no other evidence, competent or incompetent. The fair administration of justice in the federal courts should not permit the affirmance of this conviction in reliance only upon the fruits of the trial court's gross error.

2. In concentrating on the first four items in the third specification to sustain the conviction, the majority of this Court did not deny the conceded fact that grave procedural errors were involved in the prosecution of the case. So grave were these errors that

* The fact that petitioner did not object to the presence in the supplemental record of the summary of exhibits introduced by him at the contempt trial—a fact mentioned in footnote 7 of the majority's opinion—does not free those items from the error which infected them by virtue of the trial court's ruling. Petitioner, of course, could not object to the inclusion of exhibits which were in fact introduced during the contempt trial by himself. But his failure to object to their inclusion in the supplemental record on appeal cannot be taken as a waiver of any objection he may have had to the manner in which such exhibits were originally elicited as a result of the trial court's ruling.

the Government made no pretense at justifying them before the bar of this Court. And there is no hint in the majority opinion of disagreement with the dissenters' view that "There have probably been few cases in the annals of this Court where the proceedings below were afflicted with so many flagrant errors."

Apart from the erroneous burden of proof thrust upon petitioner by the trial court, the flagrant errors which may fairly be said to be conceded by the Government and by the majority of this Court are:

(a) The almost complete absence of any effort on the part of the Government to prove the alleged contempt and the prosecution's reliance on the trial court's personal knowledge of the case as a substitute for proof.

(b) The express indications by the trial judge prior to the contempt trial that he believed petitioner to be guilty of false and evasive testimony as charged in the first specification.

(c) The total failure to confront petitioner with competent proof of the alleged contempt and to permit him to cross-examine, explain or rebut such proof.

(d) The use of incompetent hearsay testimony as a major element in the trial court's judgment of conviction.

(e) The utilization of evidence not introduced at the contempt trial but contained in a supplemental record improperly filed in the Court of Appeals to secure an appellate affirmance of the conviction.

These errors were not mere harmless errors. They impregnated the whole case to such an extent that the four items in the third specification cannot legitimately be singled out as free from these errors so as

to sustain the conviction. There is no basis whatever in the record for assuming, as did the majority of this Court, that the trial judge actually did or conceivably could have considered the critical four items separate and apart from the prejudicial elements. Who can say with assurance that the trial judge's conclusion that there was adequate proof that petitioner failed to produce the four items was not affected by the erroneous factors he brought to bear on what he obviously considered to be the more important elements of the case? Did he look at these items in terms of the competent evidence only, or did he also consider the items in relation to his own personal knowledge concerning them? Did he have a preconceived idea as to petitioner's guilt relative to those items as he did relative to the first specification? Was the petitioner properly confronted with competent proof as to his failure to produce these items and given a full opportunity to cross-examine and rebut such proof?

The crucial consideration in this case must be the impact of the conceded errors on the mind of the trial judge in the total setting of the case. This must take into account what these errors meant to him in relation to the entire case, including the four items in question. As this Court said in *Kotteakos* v. *United States*, 328 U. S. 750, 765:

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had

substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

See also *Krulewitch* v. *United States*, 336 U.S. 440, 445.

And so in this case, the procedural errors so tainted the processes employed by the trial court as to make it unfair to judge the validity of the conviction solely by reference to the questionable proof as to the four items in question. So egregious were those errors, so penetrating was their effect, as to make relevant the language and holding of this Court in *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *United States*, 318 U. S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.
>
> When uncontested challenge is made that a finding of subversive design [or contemptuous conduct] by petitioner was in part the product of three perjurious witnesses [or flagrant procedural errors], it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's [or the Trial Court's] findings.

Only by reversing the conviction in its entirety and permitting a new trial free of the erroneous procedures can this Court make certain that justice will have been

done this petitioner. Only in that way can there be an untainted administration of justice in this instance.

3. The opinion of the majority of this Court contains other errors and omissions which justify reconsideration of the case:

(a) The statement (slip opinion, p. 5) that "the impounded books and records were present on the trial table" is erroneous and without warrant in the record before this Court. There is no indication in the record as to what was on the trial table, much less that the impounded books and records were there present.

(b) The statement (slip opinion, pp. 7, 9) that "Petitioner admits having previously examined the first two items" has reference to the rather ambiguous statement of the petitioner (R. 47) that he had "examined those other two records previously and was unable to find any evidence of slot machines—." But to conclude, as did the majority of this Court, that this statement shows beyond a reasonable doubt that petitioner found and examined the two items at the time he was attempting to comply with the subpoena is both unwarranted and unfair.

Petitioner's remark obviously referred to an examination made by him during the short interval of a few hours immediately preceding the contempt trial. That such is true is demonstrated by the colloquy between petitioner and his counsel immediately after this remark (R. 48):

> Q. Had you examined Respondent's Exhibit 4 prior to April 1, 1954?
>
> A. No, I have not, sir . . .

Q. And have you with me today, following the hearing this morning, made some examination of the balance of these documents that appear on this table?

A. Yes, I have, sir.

Clearly, then, petitioner in using the word "previously" in the critical statement was referring to the period immediately preceding the contempt trial and not to the period prior to April 1. Any reference to the earlier period was made explicit by counsel. The only examination of any of the documents by petitioner was done immediately prior to the contempt trial. There was thus lacking any proof whatever that any of the four items had been found or seen by petitioner or were available to him during the time he attempted to comply with the subpoena.

(c) The majority opinion completely overlooks petitioner's contention in his main brief (pp. 56-58) that subpoena No. 160, which was involved in the third specification, was "not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up" and hence petitioner could not be held in contempt of such a subpoena under the ruling of this Court in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 221. The vice of the subpoena was not its broadness as such but the fact that it required the production of a vast array of documents, including records relating to coin-operated devices which have no relevance whatever to any prosecution under the Johnson Act (the Federal Slot Machine Act, 15 U.S.C. §§ 1171-1177). Petitioner was thereby forced to cull the good from the bad and to risk a judgment as to whether any or all of the documents were evidentiary or pertinent materials. It was precisely this kind of

a subpoena which this Court said in the *Bowman Dairy* case could not be the basis of a contempt conviction. Petitioner is entitled to the benefit of that ruling.

(d) The Court throughout its opinion measures petitioner's guilt in relation to the specific items mentioned in the third specification of the order to show cause rather than in relation to the language of subpoena No. 160. Obviously, if subpoena No. 160 had been as pertinent in terminology as the third specification of contempt we might have a different case. But the subpoena was not in those terms. It was a roving request for anything connected with coin-operated devices that might turn up, regardless of any relationship to what was pertinent to the pending Johnson Act prosecution. Thus again the *Bowman Dairy* doctrine becomes critical in judging petitioner's guilt.

CONCLUSION

For the foregoing reasons, it is respectfully urged that rehearing be granted and that, upon such rehearing, the judgment of conviction be vacated and the case remanded for a new trial.

Respectfully submitted,

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We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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March 22, 1957.